

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY BERKOWSKI,

Plaintiff,

v.

Case No. 08-12862
Honorable Patrick J. Duggan

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

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OPINION AND ORDER

At a session of said Court, held in the U.S.
District Courthouse, Eastern District
of Michigan, on September 9, 2009.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On July 3, 2008, Plaintiff filed this lawsuit challenging a final decision of the Commissioner denying his application for Social Security Disability Insurance Benefits. On the same day, this Court referred the case to Magistrate Judge Mona K Majzoub. On November 17, 2008, Plaintiff filed a motion for summary judgment seeking an award of benefits or, in the alternative, an order remanding the case to the Administrative Law Judge for additional findings. On January 29, 2009, Defendant filed a motion for summary judgment. Magistrate Judge Majzoub considered both motions.

On August 13, 2009, Magistrate Judge Majzoub filed her Report and Recommendation (“R&R”) recommending that this Court deny both Plaintiff’s and Defendant’s motions for summary judgment and remand the case to the Social Security Administration for further proceedings. At the conclusion of the R&R, Magistrate Judge Majzoub advises the parties that they may object and seek review of the R&R within ten days of service upon them. (R&R at 22-23.) She further specifically advises the parties that “[f]ailure to file specific objections constitutes a waiver of any further right to appeal.” (*Id.*, citing *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466 (1985); *Howard v. Sec’y of Health & Human Servs.*, 932 F.2d 505 (6th Cir.1991); *United States v. Walters*, 638 F.2d 947 (6th Cir.1981)). Neither party filed objections to the R&R.

The Court has carefully reviewed the R&R and concurs with the conclusions reached by Magistrate Judge Majzoub. Nonetheless, 42 U.S.C. § 405(g) authorizes only two types of remand: “(1) a post-judgment remand in conjunction with a decision affirming, modifying, or reversing the decision of the Secretary (a sentence-four remand); and (2) a pre-judgment remand for consideration of new and material evidence that for good cause was not previously presented to the Secretary (a sentence-six remand).” *Faucher v. Sec’y of Health & Human Servs.*, 17 F.3d 171, 174 (6th Cir. 1994). Because this case does not require consideration of new evidence, the remand must be made post-judgment pursuant to sentence four of 42 U.S.C. § 405(g). Therefore, the Court reverses the Commissioner’s denial of Plaintiff’s benefits insofar as the ALJ’s credibility determination with respect to the issue of the severity of Plaintiff’s pain is not supported

by substantial evidence. Furthermore, the Court remands this matter to the Commissioner for proceedings consistent with Magistrate Judge Majzoub's R&R.

Accordingly,

IT IS ORDERED that Plaintiff's motion for summary judgment is **GRANTED IN PART**.

IT IS FURTHER ORDERED that Commissioner's motion for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that the Commissioner's denial of Plaintiff's benefits is **REVERSED**.

IT IS FURTHER ORDERED that this matter is **REMANDED** to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) for proceedings consistent with Magistrate Judge Majzoub's R&R.

A judgment consistent with this order shall issue.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
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